to give it such power. Local authorities do not have unlimited power. The powers of local authorities are defined in the Local Authority Ordinance and subsidiary legislation made thereunder. No rules, regulations or by-laws made under the Local Authority Ordinance must go beyond or be repugnant to the Ordinance under which they are made. Where the law is silent with regard to any particular power the council should be cautious in its action. For it may find itself acting *ultra vires*. In my view that is what precisely happened in this case.

From the evidence the applicant has shown that the council had acted *ultra vires* and also infringed the rules of natural justice. Accordingly an order for *certiorari* will be granted and the decision of the Matu and Daro District Council preventing applicant from trading at Kampong Bruit, Tekajong and Penyipah will be quashed. Costs to applicant to be taxed.

Order for certiorari granted.

RE GURBACHAN SINGH'S APPLICATION

[O.Cr.J. (Yong J.) August 24, 1966]

[Alor Star — Criminal Application No. 6 of 1966]

Criminal Law and Procedure — Habeas corpus — Applicant serving sentence passed by court — Habeas corpus not available — Criminal Procedure Code (Cap. 6), ss. 365 to 375.

The applicant had been sentenced for corruption to 9 months imprisonment and a fine of $446. His appeal to the High Court had been dismissed. The application was made for a writ of *habeas corpus*, the ground being that the president of the sessions court had wrongly convicted him because he had wrongfully refused to admit in evidence a police enquiry paper. It was also alleged at the hearing of the application that the order for retrial of the applicant which had been made in the previous proceedings was defective as the judge in ordering a retrial had not set aside the order of acquittal.

Held: a writ of *habeas corpus* cannot be granted to a person who is serving sentence passed by a court of competent jurisdiction.

Cases referred to:—

(1) *Ex parte Corke* [1954] 2 All E.R. 440.

(2) *Gurdit Singh* v. *Public Prosecutor* [1933] M.L.J. 224.

(3) *Re William Oswald Featherstone* (1954), 37 C.A.R. 146.

(4) *Re Wring and Re Cook* [1960] 1 W.L.R. 138.

CRIMINAL APPLICATION.

Jag-Jit Singh for the applicant.

Harun bin M. Hashim (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Yong J.: The applicant, Gurbachan Singh s/o Harnam Singh, was at all relevant times the Officer in Charge of the Police District of Jitra, Kedah. He was convicted by Mr. Lee, the president of the sessions court, for an offence under section 4(a) of the Prevention of Corruption Act 1961, for corruptly receiving $350, two motor car tyres and two fish, and was sentenced to 9 months imprisonment and fined $446.

The applicant appealed against his conviction and sentence. His appeal was dismissed and his conviction and sentence confirmed by the High Court.

The applicant now applies to the High Court for a writ or *habeas corpus* asking that the body of Gurbachan Singh be produced before the court and if thought fit be then and there released and set at liberty. His ground for the application as stated in his affidavit was that the president of the sessions court had wrongly convicted him because he had wrongly refused to admit into evidence the file containing Police Enquiry Paper (Traffic) No. 236/63.

It may be noted that the question of the admission or non-admission of the said file has been fully discussed and dealt with by the High Court in the applicant's appeal against his conviction and sentence in Alor Star criminal appeal No. 83 of 1964*, pages 1, 2, 3, 4 and 23 of the High Court's judgment.

In my view the proper or improper admission or non-admission of evidence by the trial court in convicting an accused person is not a good ground for granting *habeas corpus*. *Habeas corpus* is not a means of appeal against conviction and sentence. If convicted persons are not satisfied with the trial court's judgment, their remedies lie in their appeal to the High Court, the Federal Court or even to the Privy Council if they can. *Habeas corpus* should not be used as a means of appeal. I respectfully agree with the judgment of Lord Goddard C.J. in *re Ex Parte Corke* (1) where his Lordship said that:—

> "*Habeas corpus* is not a means of appeal. If they (convicted persons) complain that they are wrongly convicted, they should appeal to Quarter Sessions. A person convicted by a competent court of summary jurisdiction cannot apply for a writ of *habeas corpus* and the affidavit here shows that William Corke is in prison serving a sentence passed by the Bow Street magistrate's court under the Vagrancy Act 1824. It has always been the law . . . . that a writ of *habeas corpus* is a writ of right and not a writ of course . . . . That means that before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained. In this case, it is perfectly clear that, unless the conviction was set aside by a Court of Appeal, he is lawfully in custody serving a lawful sentence and his application for a writ of *habeas corpus* is therefore refused."

At the hearing of this application Mr. Jag-Jit Singh raised another point which was not raised in the applicant's affidavit. He said that the applicant was originally charged before Mr. Somasundram, the learned president of the

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* [1966] 2 M.L.J. 125

sessions court and was acquitted by him. The public prosecutor appealed to the High Court against the order of acquittal. The hearing came before Hepworth J., who allowing the public prosecutor's appeal said:—

"It was not therefore a case in which I could substitute a conviction in place of acquittal as I had been urged to do by the learned deputy public prosecutor.

Accordingly I allowed the appeal and ordered a retrial."

At the retrial before Mr. Lee, another president of the sessions court, the applicant was convicted and sentenced to 9 months imprisonment with a fine of $446. He appealed and his appeal was dismissed by the High Court as stated above.

Mr. Jag-Jit Singh contended that Hepworth J. was wrong in his procedure in allowing the appeal and in ordering the retrial without the words "the order of acquittal is set aside," and therefore the trial of the applicant before Mr. Lee, the president of the sessions court, was a nullity.

The deputy public prosecutor however contended that this was a mere quibble on words. He said that Hepworth J. in allowing the public prosecutor's appeal against acquittal and in ordering a retrial meant what he said. It was clear that the order of acquittal had been set aside.

As far as I am concerned, it is not necessary for me to decide this point. If the applicant's contention was correct (which I am doubtful) that he had been wrongly convicted by Mr. Lee his proper remedy is to appeal to the proper appellate court by a proper application to set his conviction aside and not by way of *habeas corpus*. It would be a sad day for the courts if one judge of the High Court could declare the order made by another judge of the High Court, a nullity, and set free a person whom the latter had convicted and sentenced to imprisonment in a case properly brought before him, without having to appeal to the proper appellate court to set aside his conviction.

Under the heading of "Purposes for which *Habeas Corpus* not granted", *Halsbury's* Laws of England, 3rd edition, volume 11 at pages 35 and 36 says:—

"The writ will not be granted to persons convicted or in execution under legal process including persons in execution of a legal sentence after conviction on indictment in the usual course."

"The writ of *habeas corpus* will not be granted where the effect of it would be to review the judgment of one of the superior courts, which might have been reviewed on a writ of error, or to question the decision of the inferior court on a matter within its jurisdiction."

The procedure for *habeas corpus* is laid down in Chapter XXXVI of the Criminal Procedure Code (sections 365 to 375). Section 365(i)(b) upon which the applicant relies states:—

"The court of a judge may whenever it thinks fit direct:—

(i) that any person who

(a) . . . . . .

(b) is alleged to be illegally or improperly detained in public or private custody within the limit of the Federation of Malaya

be set at liberty."

In the case of *Gurdit Singh* v. *Public Prosecutor* [2] it was held that:—

"A person is not improperly nor illegally detained when he has been sentenced to imprisonment by a judge of the Supreme Court in a case properly brought before him and it is not proper for another judge of the Supreme Court to act under section 363 (now section 365) of the Criminal Procedure Code to decide the question whether his detention was or was not legal or proper."

In *re William Oswald Featherstone*,[3] the Lord Chief Justice ruled that:—

"The court does not grant, and cannot grant, writ of *habeas corpus* to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant *habeas corpus* would be if it were satisfied that the prisoner was being held after the term of the sentence passed on him had expired.

This case was approved in *re Wring* and in *re Cook* [4] in which Lord Parker C.J. said:

"The court would like to take this opportunity of setting out the position in regard to these applications. The divisional court of the Queen's Bench Division has repeatedly stated that *habeas corpus* is not to be regarded as a means of appeal against conviction or sentence . . . . Accordingly a prisoner who wishes to challenge either his conviction or his sentence should apply to the Court of Criminal Appeal or to Quarter Sessions as the case may be."

These cases have established unequivocally the principle that a writ of *habeas corpus* cannot be granted to persons who are serving sentences passed by courts of competent jurisdiction. In this case there is no doubt whatsoever, that unless the applicant's conviction is set aside by the proper appellate court, he is lawfully in custody, serving a lawful sentence.

I have considered the application made by the applicant, Gurbachan Singh, for a *habeas corpus*. I have also examined the various enactments and authorities quoted by his counsel and have come to the conclusion that there is nothing in the grounds raised by the applicant or his counsel which would enable this court to grant the order.

The application for a *habeas corpus* is accordingly refused.

Application refused.

Solicitors: *Jag-Jit Singh & Co.*